Supreme Court, U.S.
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No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED BY PETITIONER

I. Whether a federal court is precluded from using a retroactive state statute validating a local government's prior monopoly contract to establish "a clearly articulated and affirmatively expressed state policy" showing "the legislature contemplated the acts complained of."

II. Whether the Local Government Antitrust Act of 1984 does not permit a federal court to weigh alternative, non-existent remedies against private defendants as a ground for granting a local government defendant retrospective immunity from all remedies, legal and equitable.

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Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE COMPANY, INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, AND CITY OF GRAPEVINE, TEXAS,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

The federal statutes involved are the Sherman Act and Clayton Act, 15 U.S.C. §1 et seq., and the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985). The latter is reprinted in Appendix B.

The state statutes involved are the Home Rule Municipal Powers Act and Texas Municipal Airports Act reprinted in Appendix C.

STATEMENT OF THE CASE

This is an antitrust case brought by taxicab drivers and owners against the Cities of Dallas and Fort Worth, joint owners of the Dallas/Fort Worth Airport and several cities within whose territorial limits some part of the airport lies. The suit alleges the contracts between the two owner cities and the provider of a single-operator ground transportation service at the airport resulted in antitrust violations as the contract prohibited Petitioner from picking up passengers at the passenger terminals.

Respondent wishes to except to Petitioner's statement (page 2, Petition) which indicates the ordinances of Respondent City of Irving, Texas, compelled taxicab owners to "deadhead, that is, to carry passengers to the airport, approximately twenty miles, and to return empty, without passengers". Respondent's disagreement with this statement is the passenger terminals which Petitioner sought to serve were not located within the territorial limits nor subject to regulatory control of this Respondent. This moots Petitioner's complaint against Respondent because this Respondent did not and could not regulate taxicab activity outside its territorial limits; therefore, Respondent could not have harmed Petitioner. However, if the terminals were located within Respondent's territorial limits and had Respondent regulated service at that terminal, Respondent's regulatory acts would have been immunized under the state action test.

Respondent further excepts to Petitioner's statement (page 4, Petition) which indicates this

Respondent was party to the contract between Dallas-Fort Worth Joint Airport Board and the cities which "modified the exclusive monopoly contract and compulsory deadheading". Respondent was not a party to said contract with the Cities of Dallas and Fort Worth relative to taxicab service provided at their airport.

Contrary to Petitioner's statement (pages 4 and 5, Petition), the trial court and Fifth Circuit Court of Appeals clearly indicated their *Town of Hallie* determination of antitrust immunity rested not upon a validating act but upon thirty (30) year old legislation, i.e., Texas Municipal Airports Act, Article 46d-4 and Article 46d-14, TEX. REV. CIV. STAT. ANN. Both Courts ruled the validating act cited by Petitioner only confirmed the state's policy of displacing competition with regulation:

> This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite. *Woolen v. City of Dallas, Texas, et al,* 801 F.2d 159 at 163 (5th Cir. 1986).

The Courts below dismissed Petitioner's antitrust actions on state action grounds, and, in the alternative held the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. (Oct. 24, 1984) was applicable to dismiss Petitioner's cause for damages, interest on damages, costs and attorney's fees against Respondents.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. CONTRARY TO PETITIONER'S CONTENTION, THE COURTS BELOW DID RELY UPON STATUTES PRE-EXISTING THE INCEPTION OF THE COMPLAINED ACTION IN REACHING THEIR DECISION THAT RESPONDENTS WERE ACTING PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY SHOWING THE TEXAS LEGISLATURE CONTEMPLATED THE KIND OF ACTION OF WHICH PETITIONER COMPLAINED.

The *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985) municipal antitrust analysis performed by the Courts below resulted in the actions of all Respondents being immunized from antitrust scrutiny. Petitioner has only one complaint relative to that analysis. Petitioner contends the Courts based their decision upon legislation enacted subsequent to the time Respondents initiated the complained action. It is understandable Petitioner attempts to distinguish his case from all other similar antitrust cases because he must do so in order to be afforded any opportunity of achieving success. Petitioner emphasizes that since the publication of *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), all Federal circuit court decisions applying the *Town of Hallie* test have found municipalities immune from antitrust scrutiny on summary motions. Petitioner has chosen to distinguish its case by characterizing it as one of "retroactive state policy." However, merely claiming the Courts below based their decision upon retroactive legislation does not make it so. Should retroactivity be a bar to the state action immunity doctrine, it does not provide

Petitioner comfort for one controlling reason. The Courts below did not rely upon retroactive legislation to conclude Respondent's activities were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

The Fifth Circuit in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Company* 760 F.2d 607, 611 (1985) cert. denied, 106 U.S. 231, based its decision on the Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., a 1947 vintage statute, in concluding the single operator concept was not subject to antitrust scrutiny. Through this Act, the Texas Legislature had delegated to the cities the State's regulatory authority over municipally owned airports. Later, when *Wooien v. City of Dallas, Texas, et al,* 801 F.2d 159 (5th Cir. 1986), came before it, the same Court held *Greater Houston* was "virtually indistinguishable from the case at bar." *Woolen, supra,* 801 F.2d 159. The Court cited that part of Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., which conferred the same authority on single city ownership that Municipal Airports Act, Article 46d-14, TEX. REV. CIV. STAT. ANN., conferred upon jointly owned airports.

The pertinent portions of Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., read as follows:

> (a) . . . In operating an airport . . . such municipality may . . . enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:
>
> . . . .

> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services. . . . *Woolen, supra,* 801 F.2d at 161 (citation omitted).

The Fifth Circuit concluded this authority was sufficient to meet the requirements of the *Town of Hallie* test and the City of Houston's actions were immune from antitrust scrutiny.

In response to Petitioner's claim no legislative authority existed at the inception of the single-operator concept of ground transportation at Dallas/Fort Worth Airport, the Courts below compared Municipal Airports Act, Article 46d-4 and Article 46d-14, TEX. REV. CIV. STAT. ANN. The Act is 1947 vintage legislation. They concluded the only difference between *Greater Houston* and the case at bar was the Houston airport was solely owned while Dallas/Fort Worth Airport was jointly owned. The Courts noted Municipal Airports Act, Article 46d-14 TEX. REV. CIV. STAT. ANN. amply delegated the State's regulatory authority to the joint-ownership municipalities and cited the statute:

> That section provides, in relevant part:
>
> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality . . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . . *Woolen, supra,* 801 F.2d at 162 (citation omitted).

After comparing the two Articles of the Municipal Airports Act, the Courts concluded the Act indicated the Legislature did not intend to distinguish between joint ownership and sole ownership airport operation and there was sufficient authority to immunize the Dallas/Fort Worth Airport operation from antitrust scrutiny stating:

> The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own

> on individually owned airports, does not affect their state action exemption. '[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management' is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the 'single-operator concept,' in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports. *Woolen, supra,* 801 F.2d at 162 (citation omitted).

This answered the adequacy of legislation question in favor of the municipalities. The same legislation clearly answered Petitioner's main contention, i.e., retroactivity. Although Petitioner claims the amendment to Municipal Airports Act, Article 46d-14 TEX. REV. CIV. STAT. ANN. and the validating act proved there was no prior immunizing authority, the Courts were of a different opinion and responded that Petitioner was in error writing:

> From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.
>
> The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legislation which clarified the role of the

> Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite. *Woolen, supra,* 801 F.2d at 163 (citation omitted).

Finally the Courts held:

> . . . the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption. *Woolen, supra,* 801 F.2d at 163 (citation omitted).

Contrary to Petitioner's contention, the Courts based their decisions upon statutory authority pre-existing the inception in 1974 of the single-operator concept for ground transportation at the Dallas/Fort Worth Airport.

The pre-existing statute provided ample, clearly articulated and affirmatively expressed state policy to displace competition in the taxicab business at the Dallas/Fort Worth Airport. This is all *Town of Hallie* requires. The Courts further answered Petitioner's contention when they forcefully noted the amendments and validating act confirmed the intent of the legislative policy originally expressed at the time the Legislature enacted Municipal Airports Act, Article 46d-14, TEX. REV. CIV. STAT. ANN., in 1947, remains unchanged.

Respondent submits Petitioner's case is on all fours with *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607

(5th Cir. 1985), cert. den., 106 U.S. 231, and the Petition should be denied.

II. THE TEXAS LEGISLATURE HAS HISTORICALLY AUTHORIZED MUNICIPALITIES TO DISPLACE COMPETITION IN THE TAXICAB BUSINESS—AUTHORITY OF RESPONDENT CITY OF IRVING TO REGULATE THE TAXICAB BUSINESS WITHIN ITS TERRITORIAL LIMITS.

If the Municipal Airports Act was not sufficient to immunize Respondents from antitrust scrutiny, the Respondent City of Irving wishes to note there are additional applicable statutes which immunize it from antitrust scrutiny. The Dallas/Fort Worth Airport passenger terminals have never been located within the territorial limits of Respondent City of Irving and Respondent has never had an ownership interest in said airport. This lack of jurisdiction prevents Respondent from exercising regulatory control over the taxicab service at those terminals and Respondent has not attempted to exercise such regulatory control. However, if the terminals were located within the Respondent's territorial limits, Respondent's regulatory control over taxicab service at those terminals would be exempted from antitrust scrutiny by virtue of statutory authorization.

The Texas Legislature has traditionally authorized municipalities to comprehensively regulate the taxicab business since the turn of this century thereby displacing competition in that field with regulation. The regulation of taxicab service by Texas municipalities is immunized from antitrust scrutiny if the action of the legislature clearly articulates and affirmatively expresses a state policy to displace competition in the

regulated area. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985) and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Company,* 760 F.2d 607 (5th Cir.) cert. denied, 106 U.S. 231 (1985).

For the past seventy (70) years, Texas Courts have uniformly held the Texas Legislature delegated its power to municipalities to control streets and regulate those doing business thereon. The Texas Civil Court of Appeals in *Craddock v. City of San Antonio,* 198 S.W. 634 (Tex. Civ. App. 1917, Refused) noted the Texas Legislature specifically vested power in municipalities to license and regulate the operation of vehicles offered to the public for hire. In *City of Dallas v. Gill,* 199 S.W. 1144, 1146, (Tex. Civ. App. 1917, Refused) the appellate court wrote:

> The Legislature having given the city of Dallas power to control its streets and to license persons doing business thereon for profit, it, in effect, repealed the common law as such action is inconsistent with the common law.

This delegation of regulatory authority was again restated in 1938 by the Texas Civil Court of Appeals in *Yellow Cab Transit Co., Inc. v. Tuck,* 115 S.W.2d 455, (Refused) when Yellow Cab sought to invalidate a City of Sherman ordinance regulating the use of its streets by vehicles for hire. The Court held the Texas Legislature through §20 of Article 1175 authorized municipalities to regulate vehicles using the public streets. It went on to emphasize this grant of authority writing:

> The Legislature has uniformly recognized, guarded, and preserved the plenary powers of municipal corporations operating under the Home Rule Amendment and the Enabling Act of the Legislature, over the streets, alleys, and public places located within the corporate limits.

Later in its opinion, the Court again noted the Legislature's deliberate effort to insure municipalities' authority to regulate for-hire vehicles was not inadvertently diminished by the passage of conflicting statutes:

> To the same extent were the rights of such corporations guarded in the enactment of chapter 277 of the Regular Session of the 42d Legislature, amending c. 314, 41st Leg., § 2, providing for the further regulation of and the issuance of permits and certificates to motor carriers for hire over the highways of this state, in providing that 'nothing in this Act or any provision thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by chapter 147, Pages 307 to 318, inclusive [now article 1165 et seq., R.S.] of the General Laws of the State of Texas passed by the 33rd Legislature, or any amendments thereto.'

These cases serve to illustrate the great deference the Texas Legislature has historically paid municipalities relative to their authority to regulate vehicles for hire. This deference has not been diminished by

passage of time as reflected by the recent opinion of the Fifth Circuit Court of Appeals in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, cert. denied, 106 U.S. 231 (1985). The Fifth Circuit cited §20 and §21 of Article 1175, TEX. REV. CIV. STAT. ANN. as the Legislature's clear articulation and affirmative expression of state policy designed to displace competition by substituting municipal regulation. The Court wrote:

> Thus, in at least a general sense, the state legislature has vested extensive regulatory discretion in its cities over the taxicab industry. *Woolen, supra*, 760 F.2d at 610 (citation omitted).

The two sections referenced by the Courts read as follows:

> 20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.
>
> 21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

This statute has long expressed state policy, as acknowledged by the Courts, that each home rule municipality is to regulate for-hire vehicles plying the streets within its territorial limits. This legislation is a clear articulation and affirmative expression of state policy to displace competition with regulation in the taxicab business. For this reason, the Respondent City of Irving would be immune from antitrust scrutiny if the terminals had been located within Respondent's territorial limits. The Petition should be denied.

III. CONGRESS DID NOT INTEND THAT THE GRANT OF RETROACTIVE IMMUNITY TO LOCAL GOVERNMENTS FROM THE DAMAGES REMEDY BE CONDITIONED SOLELY UPON THE EXISTENCE OF ALTERNATIVE EQUITABLE RELIEF AGAINST THE PRIVATE DEFENDANTS.

Petitioner contends that if some alternative remedy is not available to Petitioner, Section 3(b) of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984), enjoins the Courts from applying Section 3(a) of the Act to dismiss the defendant municipalities. Certainly that which Petitioner suggests is not supported by the very language of Section 3(b). That Section provides:

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of

> a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

15 U.S.C. §35 (Supp. III, 1985).

The application of Section 3(a) to prevent recovery of damages, costs or attorney's fees from municipalities is not solely hinged upon a finding that alternative relief is or is not available. Section 3(b) specifically requires Courts to weigh all aspects of the case rather than one. The Legislative mandate to the Courts is to evaluate "all the circumstances, including the stage of litigation." The trial court and the Fifth Circuit explicitly followed the mandate of Section 3(b) in determining whether Section 3(a) should be applied to the municipal defendants. The factors which both Courts analyzed are set forth as follows:

1. Stage of litigation;
2. Availability of alternative relief under the Clayton Act;
3. Whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
4. The financial harm which a treble damage award could inflict upon the municipality and its taxpayers; and
5. Whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

The Courts carefully examined all of these factors and determined it would be inequitable not to apply Section 3(a) to the Defendants stating:

> The Court determines, in light of all the circumstances, that it would be inequitable not to apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. §35(a), to this case. *Woolen, supra,* 801 F.2d at 167 (citation omitted).

It is submitted the Act does not require every one of the many factors under consideration to be in favor of the municipality as a condition to dismissing the antitrust action.

There is nothing in the opinion to suggest the Courts improperly applied Section 3(b) in dismissing the municipal defendants.

One additional reason why it would be inequitable not to dismiss the Petition is that this Court has previously denied certiorari in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 cert. denied, 106 U.S. 231, (1985) which the Fifth Circuit Court of Appeals characterized as being "virtually indistinguishable from the instant actions." *Woolen, supra,* 801 F.2d 159 at 161.

It would be proper to deny the Petition for the reason the Fifth Circuit properly analyzed the case pursuant to the requirements of the Local Government Antitrust Act of 1984.

CONCLUSION

The Fifth Circuit Court of Appeals properly considered and applied the *Town of Hallie* test to the facts in the case at bar as it did in *Independent Taxicab Drivers' Employees v. Greater Houston Trans-*

portation Company, and Petition should be denied for the reason the actions of Respondent are immune from antitrust scrutiny.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1564

JOHN WOOLEN, *et al.*,
Plaintiffs,
JOHN D. CAMPISI, Individually and as Class Action Plaintiffs, *et al.*,
Plaintiffs-Appellants,
and
CARL WHORTON, *et al.*,
Intervenors-Appellants,
v.

SURTRAN TAXICABS, INC., *et al.*,
Defendants-Appellees.

KEN WHORTON, *et al.*,
Plaintiffs-Appellants,
v.

CITY OF DALLAS, TEXAS, *et al.*,
Defendants-Appellees.

OPINION

Filed September 26, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Per Curiam

Appeals from the United States District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge, Presiding

OPINION

PER CURIAM:

We affirm the judgment of the district court on the basis of its careful opinion which is attached as Appendix A.

AFFIRMED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. 3-78-745

JOHN WOOLEN, *et al.*,

Plaintiffs,

VS.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

ORDER

The factual allegations in these antitrust actions have already been reported twice and need not be repeated at length here. See *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025 (N.D. Tex. 1978) (denying motions to dismiss); *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982) (vacating order denying intervention). In a nutshell, the plaintiff taxicab drivers claim that the defendants have excluded them from the outbound taxicab market at the Dallas/Fort Worth Regional Airport since the airport's opening in 1974, in violation of the Sherman Act.

Recent antitrust law developments, most notably passage of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), and the recent decisions in *Town of*

Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), now require that three issues be addressed, including one previously decided in the original district court opinion in this case:[1]

I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?

II. Should the Plaintiffs' claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the defendant cities be dismissed under § 3 of the Local Government Antitrust Act of 1984?

III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

For the reasons set forth below, the Court answers each question in the affirmative.

---

[1] After these actions were filed in 1978, all defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, each asserting the state action exemption. These motions to dismiss were denied in the original district court opinion, 461 F.Supp. at 1031-33. On May 24, 1985, the Court issued an Order stating that it would reconsider these motions in light of subsequent authority. All parties submitted new briefs. On June 28, 1985, the private defendants—Surtran Taxicabs, Inc., Yellow Cab of Dallas, Inc., and Fort Worth Cab & Baggage Company, Inc.—moved for summary judgment under Rule 56, asserting the state action exemption and *Noerr-Pennington* immunity.

The issues concerning the Local Government Antitrust Act of 1984 were raised by the Court in an Order issued December 6, 1984. In response to that Order, each party filed papers addressing the applicability of the Act's provisions.

I. The State Action Exemption

A. The Municipal Defendants

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court, relying on principles of federalism and state sovereignty, determined that the Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. *Id.* at 350-51. Thirty-five years later, the Court also held that municipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). These actions were filed shortly after *City of Lafayette* was decided.

City of Lafayette did not completely prohibit municipalities from claiming the state action exemption. Instead, the plurality opinion suggested that the state action doctrine "exempts only anticompetitive conduct engaged in as an act of government . . . [by a political subdivision of the state] pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The opinion went on to explain:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense . . . [A]n adequate state mandate for anticompetitive activities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated that kind of action complained of."

435 U.S. at 419 (citation omitted). Finally, "*City of Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a 'clearly articulated and affirmatively expressed . . . state policy' that was 'ac-

tively supervised' by the State." *Town of Hallie,* 105 S. Ct. at 1717, quoting *City of Lafayette,* 435 U.S. at 410.

Considerable debate ensued over what would constitute an adequate articulation and expression of state policy, and what would constitute active supervision. In *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), the Court held that a home rule provision of the Colorado Constitution which allocated only the most general authority to municipalities to govern local affairs did not satisfy the clear articulation component of the state action test. The opinion also suggested that whether active supervision by the state of the anticompetitive conduct was required was an open question, despite the plurality opinion in *City of Lafayette.* 455 U.S. at 51-52, n.14.

Noting that "[i]t is fair to say that our cases have not been entirely clear," 105 S.Ct. at 1720, the Court resolved much of the debate in *Town of Hallie.* A unanimous Court reiterated that the state action exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area. *Id.* at 1719. The Court further held that "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.* Finally, the Court concluded that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.*

The Fifth Circuit has applied *Town of Hallie* in a case which is virtually indistinguishable from the instant actions. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985), the City of Houston had entered into a contract with the Greater Houston Transportation Corporation by which the City granted an exclusive concession over passenger service at Houston Intercontinental Airport. Two

groups of taxicab owners and operators filed suit under the Sherman and Clayton Acts, seeking damages and injunctive relief from the City and its private contractor. The district court dismissed the complaint on defendants' motion for summary judgment, holding that the City was immune from antitrust scrutiny under the state action exemption and that the private contractor was immune under the *Noerr-Pennington* doctrine. The Fifth Circuit affirmed.

The Court's analysis focused on the relevant provision of the Texas Municipal Airport Act, which authorizes municipalities to establish and operate airports both within and without their boundaries. Article 46d-4 provides:

> (a) In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangement for a term not exceeding forty (40) years with any persons:
>
> . . .
>
> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . .

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969). The Fifth Circuit said:

> While the latter provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management.
>
> This indication is all we require. . . . We think it . . . clear that the City of Houston might deem

> it most efficient to confer the privilege of airport taxicab operation on a single company, and that such a decision is a logical or reasonable consequence of the state's broad allocation of authority to the City to run its own airport.

760 F.2d at 610-11. The Fifth Circuit also disposed of the question concerning the impact of Article 46d-7(c)—a major stumbling block in the first district court opinion in this case, *see* 461 F.Supp. at 1031:

> Similarly, it is of limited significance that the statute authorizing municipal airport management states that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States. . . ." [Article 46d-7(c).] The relevant question is not whether the City has transgressed federal law, but whether the Sherman & Clayton Acts apply to the City at all.

760 F.2d at 612, n.8.

Plaintiffs seek to distinguish *Independent Taxicab* on two grounds: (1) Houston Intercontinental is wholly owned and operated by the City of Houston, whereas the Dallas/Fort Worth Regional Airport is jointly owned and operated by the Cities of Dallas and Fort Worth, and (2) recent statutory amendments demonstrate that taxicab operations at jointly owned and operated airports were in a "regulatory void" until 1983.

The first argument is of no import. The Cities of Dallas and Fort Worth operate the airport through the Dallas/Fort Worth Regional Airport Board, a joint board created under § 14 of the Municipal Airport Act, Article 46d-14. That section provides, in relevant part:

> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality. . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . .

The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own on individually owned airports, does not affect their state action exemption. "[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management" is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the "single-operator concept," in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports.

Defendants second argument is based on legislation passed in 1983. The Obstruction to Air Navigation Control and Taxicab Licensing Act, 1983 Tex. Gen. Laws, ch. 626, at 4015, amended § 14 of the Municipal Airport Act to provide that:

> (d)(6) Taxicab Licensing. . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolution, rules, regulations, or orders of the joint airport board dealing with subjects authorized by Subdivision (65) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies.

Article 46d-14(d)(6)-(7) (Vernon Supp. 1985). While this statute was not enacted until well after the bulk of the actions challenged in these suits, it is significant as an indication of state policy, particularly when read in conjunction with § 2 of the Municipal Airport Act Amendments of 1983, 1983 Tex. Gen. Laws, ch. 978, at 5322, which provides:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.

The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legis-

lation which clarified the role of the Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite.

The plaintiffs' operations at the airport were limited because ground transportation service was provided by means of a single-operator concept. The Cities of Dallas and Fort Worth own the airport and, as noted above, operate it through the Dallas/Fort Worth Regional Airport Board. The Cities of Dallas and Fort Worth contracted with the Airport Board to provide ground transportation under the single-operator concept. To meet their obligations to the Board, the Cities of Dallas and Fort Worth formed an entity known as the D/FW Surtran System. The System then solicited bids for the provision of the taxicab component of the ground transportation services. Yellow Cab of Dallas and Fort Worth Cab & Baggage formed an entity known as Surtran Taxicab, Inc., which submitted the winning bid. The D/FW Surtran System then contracted with Surtran Taxicab, Inc., for the provision of taxicab service at the airport. The single-operator concept, then, originated in the first agreement between the Airport Board and the Cities of Dallas and Fort Worth. The 1983 validation statute confirms that, under state law, the single-operator concept was lawful.

For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports.

The Court concludes that Plaintiffs' actions against the Cities of Dallas, Fort Worth, Grapevine and Irving should be dismissed because the challenged conduct is immune

from scrutiny under the antitrust laws by virtue of the state action exemption.

B. The Private Defendants

In a companion case to *Town of Hallie*, the Supreme Court outlined the criteria a private party must satisfy to fall within the state action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727 (1985) (citations omitted). The Court explained the reason for extending the state action exemption to private parties:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such programs merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.

Id. at 1726-27. Instead, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Id.* at 1728.

The private defendants have met the first prong of the test. As discussed above, the single-operator concept re-

sulted from the state's clearly articulated and affirmatively expressed "desire to abdicate in favor of municipal prescience with regard to airport managment." 760 F.2d at 610. Because the Cities of Dallas and Fort Worth determined that the single-operator concept would be used at the airport and solicited bids only on this basis, it is fair to say that the private defendants, who simply submitted a bid, were compelled to participate in the anticompetitive activity if they wanted to provide taxicab service at the airport. As the Court said in *Southern Motor Carriers*, "compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition." 105 S.Ct. at 1729.

The active supervision requirement—the second prong of the test—"prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.* at 1729, quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). "[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

Midcal involved a challenge to a California wholesale wine pricing system that the Court found resulted in a de facto resale price maintenance program. The Court held that the system was a clearly articulated state policy, but that it did not meet the active supervision requirement:

> The State simply author s price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor

> does it regulate the terms of fair trade contracts. The States does not monitor market conditions or engage in any "pointed reexamination" of the program.

455 U.S. at 105-106.

In the instant actions, there is no doubt that the Cities of Dallas and Fort Worth, and the Regional Airport Board, have actively supervised the private defendants' conduct. The details of taxicab service at the airport are set forth comprehensively in the contracts between D/FW Surtran System and Surtran Taxicabs, Inc., attached to the complaints. Further, the successive contracts show a gradually changing approach to ground transportation at the airport. For example, the 1979 Contract allows Surtran Taxicabs to subcontract with other taxicab companies for provision of service at the airport.

The Court concludes that the Plaintiffs' actions against the private defendants should be dismissed because the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption.

II. The Local Government Antitrust Act of 1984

The second question before the Court is whether the plaintiffs' claims for damages, interest on damages, costs and attorney's fees against the cities should, in the alternative, be dismissed under § 3 of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), which provides:

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

Section 3(b) of the Act "was a compromise between those Congressmen who thought that retroactive application was not in accord with Congress' traditional approach to changing existing law and those who felt that denial of retroactive application would unjustly penalize those localities that were defendants in pending suits for treble damages." *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F.Supp. 1125, 1131 (E.D. La. 1985).

There is no dispute that these cases were commenced before the effective date of the act and that the cities of Dallas, Fort Worth, Grapevine and Irving are local governments within the meaning of § 2(1)(A) of the Act, 15 U.S.C. § 34(1)(A). The question, then, is whether it would be inequitable not to apply § 3(a) retroactively on the facts of these cases.

The Joint Explanatory Statement of the Conference Committee, which accompanied the Conference Report on the Bill, discusses the application of the Act to pending cases:

> The application to pending cases of the money damage protection afforded by § 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that

> it would be inequitable not to apply this Act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

Conference Report of H.R. 6027, 98th Cong., 2d Sess., 130 Cong. Rec. H11,850-51 (daily ed. Oct. 10, 1984). "This Statement makes clear that as either of the two factors specifically mentioned in § 3(b) of the Act (stage of litigation and availability of alternative relief under the Clayton Act) moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult." *Jefferson Disposal,* 603 F.Supp. at 1132.

In addition to the two factors listed in the statute—the stage of the litigation and the availability of alternative relief under the Clayton Act—the legislative history indicates that the Court should expressly consider at least three other factors in deciding the equity question:

> In making its determination as to whether a local government should be protected against damages in a currently pending case, however, the statement of managers specifically directs the court

> to consider all relevant circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act—that is, the injunction remedy. But public policy requires that the court's inquiry in such instances must not be limited solely to antitrust considerations in cases brought against local governments. Among the other relevant factors, the court should properly consider:
>
> First, whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
>
> [S]econd, the financial harm which a treble damage award could inflict on the municipality and its taxpayers; and
>
> [T]hird, whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

130 Cong. Rec. H12,187 (daily ed. Oct. 11, 1984) (remarks of Rep. Fish). *Accord, id.* at H12,184 (remarks of Rep. Lungren). *But see id.* at S14,368 (remarks of Sen. Metzenbaum), *reprinted in Miami International Realty Co. v. Town of Mt. Crested Butte,* 607 F.Supp. 448, 452 n.2 (D. Colo. 1985) (additional factors suggested on the House floor do not reflect Congressional intent). The Court will consider the statutory factors first, then those suggested by the legislative debates.

The Stage of Litigation. This litigation is now seven years old, but chronological age is deceptive in this instance. These suits were filed in May and June of 1978. The initial motions to dismiss were filed on November 29, 1978. Discovery then went forward on the class certification issues, and on the merits from February, 1979, forward. The class certification hearing was held in October 1979. The Court's ruling on class certification was issued

December 31, 1980. Both cases were essentially dormant during the period the Court had the class certification issues under advisement.

The December 31, 1980, Order also denied the motion to intervene in the *Campisi (Woolen)* suit, which had been filed by some of the *Whorton* plaintiffs. Those plaintiffs appealed in January 1981. The Fifth Circuit's opinion was issued on August 30, 1982. The mandate was filed in the district court on September 27, 1982. No proceedings, other than those related to the appeal, took place during the pendency of the appeal.

After this case was remanded, the *Campisi* plaintiffs moved to modify the class certification order to certify a damages class and the *Whorton* plaintiffs moved to decertify the class. All parties filed statements concerning the future course this litigation should take. In the ensuing 2 1/2 years, though, no party has made any real effort to complete discovery and ready the case for trial on the merits.

The past 5 1/2 years has not been devoted to preparation for trial on the merits. Completion of pretrial discovery would take at least another year. Because the status of these actions has not changed since the effective date of the Act, the Court need not determine whether the appropriate date for assessing the stage of the litigation is the date of this Opinion or the date the Act took effect, September 24, 1984—30 days before its date of enactment under § 6 of the Act. *See Jefferson Disposal,* 603 F.Supp. at 1132 n.16.

The failure to complete pretrial discovery before the effective date of the Act is a significant indication that § 3(a) should be applied retroactively. *See* 130 Cong. Rec. H12,186 (daily ed. Oct. 11, 1984) (remarks of Rep. Hyde) (the fact that pretrial discovery has not been completed "is an important distinction between the first and second sentences of section 3(b) for purposes of retroactive ap-

plication"); *id.* at H12,187 (remarks of Rep. Rodino) (uncompleted pretrial discovery "is the essential difference made in the conference report between pending cases generally, and pending cases where a jury verdict or district court decision has been rendered.") Congressman Hyde and Rodino were floor managers for the Act. Their statements during the course of debate are particularly useful in determining Congress' intent. *Miami International Realty,* 607 F.Supp. at 452 n.2. The failure to complete discovery before the effective date of the Act has particular weight where, as here, major discovery remains to be conducted.

The Availability of Alternative Relief Under the Clayton Act. "[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation." 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston). *Contra Miami International Realty,* 607 F.Supp. at 454 ("the potential damage liability of other defendants should not enter into the calculus used in determining whether to apply § 3 to pending cases").

Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

Any continuing injury could be halted with injunctive relief prohibiting the cities from excluding the plaintiffs from the outbound taxicab market at the airport, or other appropriate prohibitions. "Injunctive remedies under § 16

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[2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality.

[of the Clayton Act] may be as broad as necessary to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 925 (9th Cir. 1975).

Exercise of Normal Regulatory Authority & Action in Furtherance of State Law. As discussed in Part I of this Opinion, the cities were plainly exercising their normal regulatory authority and acting in furtherance of state law in their implementation of taxicab service at the airport.

Financial Harm of a Treble Damages Award. The combined actions seek actual damages of $7,000,000, which would be trebled to $21,000,000. Such an award inevitably would have an adverse impact even on these major cities, but they would not be crippled in their provision of services or forced into bankruptcy. The burden would also be shared by the three nonmunicipal defendants. The magnitude of any adverse consequences falls far short of those suggested as benchmarks in the House:

> [W]hether an adverse impact would be felt by the unit of local government and its residents because of the antitrust damage award . . . is important because certainly we do not want the antitrust laws of our country to result in insolvency with respect to our local governments, nor to intrude in such a way on local government that we do not have people coming forth to serve on local government out of fear of potential antitrust suits.

130 Cong. Rec. H12,184 (daily ed. Oct. 11, 1984) (remarks of Rep. Lungren). At the same time, "[i]t cannot be denied that a judgment of that magnitude would have an adverse impact on any community in this country and would be totally at odds with the spirit and intent of the Act." *Jefferson Disposal*, 603 F.Supp. at 1135.

Conclusion. The Court determines, in light of all the circumstances, that it would be inequitable not be apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. § 35(a), to this case. Plaintiffs' claims under § 4 of the Clayton Act, 15 U.S.C. § 15, for damages, interest on damages, costs, and attorney's fees against the Cities of Dallas, Fort Worth, Grapevine and Irving are dismissed on this additional ground. This dismissal does not affect Plaintiffs' claims for costs and attorney's fees under § 16 of the Clayton Act, 15 U.S.C. § 26, as the Act does not encompass them. *Jefferson Disposal,* 603 F.Supp. at 1133 n. 19.

Under the express language of § 4(b) of the Act, the relief provided to private litigants is not available to the private defendants in these actions because they were commenced before the effective date of the Act.

III. Noerr-Pennington

The private defendants have moved for summary judgment on the ground that their activities are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. See *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

"The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition." *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566 (5th Cir. 1984) (en banc), *petition for cert. filed,* 105 S. Ct. 1164 (1984). The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of a right to assemble and petition the government. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme,

itself violative of the Sherman Act." *Pennington,* 381 U.S. at 670. As the Court later said:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interest may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

However, "a defendant cannot rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business." *Affiliated Capital,* 735 F.2d at 1567. This sham exception may manifest itself in a variety of ways. *See Coastal States Marketing v. Hunt,* 694 F.2d 1358, 1371 n.42 (5th Cir. 1983); ABA Antitrust Section, Antitrust Law Developments 615-18 (2d ed. 1984). The plaintiffs in the instant actions have not suggested what variety of the sham exception they believe is applicable here.

Recognizing that "[a petitioning party] should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for [governmental] relief is a significant motivating factor underlying [the petitioning activity]," the Fifth Circuit has said that the sham exception is initially established by a showing that the defendant's petitioning activity was "substantially" motivated by impermissible anticompetitive factors. If this showing is made, the defendant must demonstrate to the satisfaction of the trier of fact that the defendant's petitioning activity was "substantially" motivated by a hope of governmental relief. If the defendant discharges this burden, "[n]othing more is

required to bring the case within the immunity." *Coastal States Marketing,* 694 F.2d at 1372 & n.45.

The summary judgment record in this case discloses no genuine issue as to any facts material to determination of the *Noerr-Pennington* question. The undisputed facts demonstrate that the private defendants are entitled to summary judgment by virtue of the *Noerr-Pennington* doctrine. The same comments made by the Fifth Circuit in *Independent Taxicab* apply here:

> Viewing the record in the light most favorable to [plaintiffs], the most that can be said is that [the private defendants] secured from the [Regional Airport Board] an exclusive concession whose anticompetitive effects stem primarily from a valid municipal, and vicariously state, policy. It would be anomalous to hold on the one hand that government can contract with private entities to effectuate valid, albeit anticompetitive, policies, while holding on the other hand that private entities cannot petition government to participate in the public endeavor.

760 F.2d at 613.

> This result is compelled if *Noerr-Pennington* protection is to have meaning in the context of agreements with the government. First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.

Greenwood Utilities Commission v. Mississippi Power Company, 751 F.2d 1484, 1505 (5th Cir. 1985).

The single-operator concept, which is at the heart of Plaintiffs' claims, apparently originated in an independent consultant's report prepared for the Cities of Dallas and Fort Worth in 1964. Even if the private defendants ac-

tively lobbied for implementation of the single-operator concept and vigorously pressed their views concerning criteria the successful bidder would have to meet in such areas as minimum insurance coverage and fleet size, *Noerr-Pennington* would apply because these activities plainly were not a sham. Plaintiffs' alleged injuries were caused by the governmental action which the private defendants genuinely attempted to secure and succeeded in securing. *See In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568, 587-90 (N.D. Cal. 1981), *aff'd,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 3114 (1983).

Plaintiffs' contention that the private defendants' actions fall within the co-conspirator exception to the *Noerr-Pennington* doctrine is without merit. Viewing the summary judgment record in the light most favorable to plaintiffs, the most that has been shown is mere adoption by the cities of some of the private defendants' proposals. The record shows that while some of the private defendants' suggestions were adopted, the general concept and specific details of taxicab service at the airport were closely scrutinized and extensively debated by a variety of public and private entities. There is no evidence of a conspiracy. See *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. 991, 1016-23 (S.D. Tex. 1981), *adopted in relevant part,* 735 F.2d at 1567 (applying co-conspirator exception where the evidence revealed "active participation and orchestration by public officials in an anticompetitive agreement").

The Court concludes that the plaintiffs' claims against the private defendants should also be dismissed as barred under the *Noerr-Pennington* doctrine.

IV. The Civil Rights Claim

In their First Amended Complaint, filed May 17, 1985, the *Whorton* plaintiffs allege that the defendants' conduct constituted "a discrimination against the rights of the Plaintiffs under the Civil Rights Act and the Constitution

of the United States." *Id.* ¶ 17, at 9. The *Whorton* plaintiffs have not further elaborated on this cause of action in any document filed with the Court, nor have they identified what statute they purport to sue under.

This alleged civil rights claim based on discrimination has no plausible foundation and is wholly insubstantial and frivolous. It is dismissed for want of subject matter jurisdiction. Rule 12(b)(1). *See Williamson v. Tucker*, 632 F.2d 579, 590-91 (5th Cir. 1980) (discussion of applicable standards). In the alternative, the civil rights claim is dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

V. Summary of Holdings

1. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.

2. Plaintiffs' antitrust claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the Defendant cities are DISMISSED under § 3 of the Local Government Antitrust Act of 1984 because, in light of all the circumstances, it would be inequitable not to apply § 3(a) of the Act to this case.

3. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

4. The *Whorton* Plaintiffs' civil rights claim is DISMISSED for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

5. This Order disposes of all pending claims in this litigation. Judgment will be entered accordingly.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. CA-3-78-745

JOHN WOOLEN, *et al.*

Plaintiffs,

v.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

FILED
AUG 8 1985

ORDER OF DISMISSAL

Civil action nos. 3-78-609 and 3-78-745 are dismissed.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

APPENDIX B

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

For Legislative History of Act, see Pamphlet No. 10A
An Act to clarify the application of the Clayton Act to the official conduct of local government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city,county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

APPENDIX C

STATE STATUTES
APP. C-I

TEXAS MUNICIPAL AIRPORTS ACT
(As Amended, 1985)

Art. 46d-4. Operation and use privileges

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility.

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under Other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agree-

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[1] Article 46d-12.

ment pursuant to Section 12 of this Act, a municipality may be contract, lease or other arrangement, upon a consideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

APP. C-II

TEXAS MUNICIPAL AIRPORTS ACT (1947)

Art. 46d-14. Joint operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act,[1] any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in

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[1] Article 46d-1 to 46d-22.

the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and cost of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air

navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective

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[2] Article 46d-4.

[3] Article 46d-7.

only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

APP. C-III

TEXAS HOME RULE ACT
(1913)

Art. 1175. Enumerated powers

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.